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IN THE

Supreme Court of the United States

October Term, 1971

No. 70-110

STATE OF WISCONSIN,

Petitioner,

v.

JONAS YODER,

Respondent.

STATE OF WISCONSIN,

Petitioner,

v.

ADIN YUTZY,

Respondent.

STATE OF WISCONSIN,

Petitioner,

v.

WALLACE MILLER,

Respondent.

On Certiorari to the Supreme Court of the State of Wisconsin

BRIEF *AMICI CURIAE* OF THE SYNAGOGUE COUNCIL OF AMERICA AND ITS CONSTITUENTS (THE CENTRAL CONFERENCE OF AMERICAN RABBIS, THE RABBINICAL ASSEMBLY OF AMERICA, THE RABBINICAL COUNCIL OF AMERICA, THE UNION OF AMERICAN HEBREW CONGREGATIONS, THE UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA, THE UNITED SYNAGOGUE OF AMERICA) AND THE AMERICAN JEWISH CONGRESS

Interest of the *Amici*

The Synagogue Council of America is the coordinating body of American Judaism. Its six constituents are the recognized rabbinic and congregational representatives of the three branches of American Judaism—Orthodox, Conservative and Reform.

The American Jewish Congress is an association of American Jews organized to oppose racial and religious discrimination and to help preserve democratic values, principles and practices.

American Jewry has a strong interest in universal secular education for children. Some of the *amici* maintain and support Jewish day schools throughout the country in which children may receive their secular education from pre-kindergarten through secondary school in combination with their religious studies. All the *amici* strongly support the American public school system and deem it one of America's greatest contributions to civilization.

All the *amici,* however, also have a strong interest in religious freedom and in a religiously and culturally pluralistic America. Because of their concern that a reversal of the decision of the Supreme Court of Wisconsin may imperil these precious values, they submit this brief *amici curiae.*

Statement of the Case

Wisconsin law (Section 118.15(1), Wisconsin Statutes, 1969) requires attendance of all children at school between the ages of 7 and 16. The respondents herein, adherents to the Old Order Amish faith, cannot consistently with that faith send their children to school beyond the elementary school level and the age of fourteen. They were accordingly prosecuted for violation of the law and pleaded the First Amendment's guaranty of the free exercise of religion as their defense. The Supreme Court of Wisconsin, reversing lower courts, upheld the validity of the defense and the State of Wisconsin petitioned for and was granted certiorari to review the Wisconsin Supreme Court's decision.

The Question Presented

The specific question presented in these cases is whether a state can constitutionally punish parents who for religious convictions do not require their children who have attained the age of 14 to attend secondary school.

Summary of Argument

The Court is called upon in these cases to pass upon and resolve a clash of competing interests, all occupying high levels in our democratic scale of values. On the one side there is first and foremost the claim of religious liberty. Allied with it are the claims of religious and cultural pluralism, parental rights and family privacy, and the rights of mature minors. Opposed are the interests of the state in an educated citizenry and its obligation as *parens*

patriae to protect what it deems the welfare of persons who are legally minors.

In resolving the claim of religious liberty, tests such as the belief-action dualism or the general law test do not point to any clear decision. More significant is the high value which we have from our beginnings as a nation placed upon freedom of conscience. Recent decisions of this Court show that only the clearest proof of immediate threat to a compelling state interest will justify so serious an infringement upon that freedom as is presented in these cases. No such proof has been presented here.

Pluralism, parental right and family privacy, and the freedom of mature minors to participate in the determination of the course of their own lives, all support if they do not alone compel a decision upholding the judgments appealed from.

ARGUMENT

I

The Free Exercise of Religion guaranty of the First Amendment requires affirmance of the decision appealed from.

A. Inapplicable Tests

1. The Belief-Action Dichotomy

It is almost a truism that while under the Free Exercise Clause of the First Amendment freedom of belief is absolute, freedom to act is not and that all conduct remains subject to regulation for the protection of society. *Cantwell* v. *Connecticut*, 310 U. S. 296, 303-304 (1940). This dichotomy justifies governmental proscription of polyg-

amy, child labor and breach of the peace. *Reynolds* v. *United States*, 98 U. S. 145 (1878); *Davis* v. *Beason*, 133 U.S. 333 (1890); *Prince* v. *Massachusetts*, 321 U. S. 158 (1944); *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942). It also has been urged as ground for upholding the constitutionality of a statute similar to the one in issue here when applied against Amish parents who withdrew their child from public education after she completed elementary school and attained the age of fourteen. *State of Kansas* v. *Garber*, 197 Kan. 567, 419 P.2d 896, cert. den. 389 U. S. 51 (1966).

The dichotomy itself, however, is not an absolute. It obviously cannot mean that government is not subject to constitutional restrictions in its regulation of conduct, even nonreligiously motivated conduct; the Due Process Clause remains a barrier to unreasonable and arbitrary restrictions on conduct. *Meyer* v. *Nebraska*, 262 U. S. 390 (1923); *Pierce* v. *Hill Military Academy*, 268 U. S. 510 (1925). Where, as we indicate shortly, governmental restrictions on conduct impinge upon religious conscience, constitutional restraints are even more demanding. Hence, the fact that the statute herein regulates not belief but action (or, more accurately, non-action) does not immunize it from judicial scrutiny.

2. *The General Law Test*

In *Minersville School District* v. *Gobitis*, 310 U.S. 586 (1940), the Court, in upholding the expulsion from public school of Jehovah's Witnesses' children who refused to participate in a flag salute exercise, said (at 594-595):

> * * * The religious liberty which the Constitution protects has never excluded legislation of general scope

> not directed against doctrinal loyalties of particular sects. Judicial nullification of legislation cannot be justified by attributing to the framers of the Bill of Rights views for which there is no historic warrant. Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities. * * *

Although the Kansas Supreme Court in *Garber* did not specifically cite *Gobitis,* it did apply its principle, stating that "Failure to comply with reasonable requirements in the exercise of the police power for the general welfare has never been condoned in the name of religious freedom."

If this principle were the law of the land today it would be difficult to uphold the decision of the Wisconsin Supreme Court in the present cause under the Free Exercise Clause, for we do not contend that the Wisconsin statute is "aimed at the promotion or restriction of religious beliefs," nor that it exceeds the reasonable exercise of the state's police power for the general welfare.

Yet, if these are the limits of constitutionally protected religious liberty there would be no need for the Free Exercise Clause. Restrictions upon the expression of religious beliefs would be forbidden by the freedom of speech guaranty. *Schneider* v. *New Jersey,* 308 U.S. 147 (1939); *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624 (1943). A law aimed at the restriction of religious

conduct generally would be forbidden by the mandate of neutrality toward religion in the Establishment Clause (*Everson* v. *Board of Education*, 330 U.S. 1 (1947)) and one directed against a particular sect would violate both that clause and the equal protection guaranty. *Fowler* v. *Rhode Island*, 345 U.S. 67 (1953).[1]

It may well be the unique function of the Free Exercise Clause to protect those whose particular religious beliefs forbid compliance with the demands of a general, secular law not deemed objectionable by adherents of the conventional faiths. Decisions which have rejected claims of unconstitutional infringement upon the free exercise of religion are justifiable not on the ground that the First Amendment may never require exemptions from general nondiscriminatory welfare laws, but because of the presence of a paramount, overriding societal need, such as preservation of the monogamous family society (*Reynolds* v. *United States*, 98 U.S. 145 (1878) or national defense (*Hamilton* v. *Regents of California*, 293 U.S. 245 (1934)).

When the Court held that a state could constitutionally forbid Sabbatarians from engaging in secular business on Sundays it did not do so on the ground that religious exemptions from welfare laws may never be required by the First Amendment but that they are not required where the burden on religious observance is indirect and the state cannot accomplish its welfare purpose except by imposing

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1. While the Equal Protection Clause is not expressly applicable to the Federal Government, this Court has consistently stricken down Federal action which if it had been that of the states would have violated the Equal Protection Clause. See *Hurd* v. *Hodge*, 334 U.S. 24 (1948); *Bolling* v. *Sharpe*, 347 U.S. 497 (1954); *Schneider* v. *Rusk*, 377 U.S. 163 (1964).

the burden. *Braunfeld* v. *Brown*, 366 U.S. 599 (1961). In the present cases, of course, the burden is direct (as it would have been in *Braunfeld* if the state law compelled affirmative conduct on Saturday rather than merely forbade secular conduct on Sunday).

In any event, the general law test is not the rule today, if it ever was. In *Sherbert* v. *Verner*, 374 U.S. 398 (1963), the Court held that a state could not exclude from the benefits of its unemployment compensation law one who because of religious convictions refused to accept employment requiring him to work on his Sabbath. And in *In re Jenison*, 375 U.S. 14 (1963), the Court, on the basis of *Sherbert*, set aside a judgment of contempt imposed against a woman who refused to serve on a jury because she believed she would thereby violate the command of Jesus that one should not judge lest he be judged.[2] In both of these cases, the Court's decisions are quite obviously incompatible with the general law test.

B. The Applicable Principle

In arriving at the appropriate principle to be applied in these cases, we note initially that the rights of the Old Order Amish are not less because they constitute a small group. Indeed, it is only where an assailed group is a small one that the issue of religious liberty is likely to come to the courts. The purpose of a Bill of Rights is to protect minorities; a major religious group does not usually need the First Amendment for its protection. The smaller the minority, the more likely it is to need judicial protection;

2. On remand, the Minnesota Supreme Court reversed itself on the basis of *Sherbert* and held that punishment would violate the Free Exercise Clause. 267 Minn. 136, 125 N.W. 2d 588 (1964).

the greater it is, the more likely it is to obtain the protection it needs through legislative exemption. It is the "discrete and insular" minority which has the right not only to invoke judicial protection but to demand a "more searching judicial inquiry" than when major groups are involved. (*Cf. United States* v. *Carolene Products,* 304 U.S. 144, footnote 4 (1938)).

Certainly the decisions of this Court give no indication of a reluctance to intervene where the affected religious group is small. The many Jehovah's Witnesses cases, upon which so much of today's laws of religious liberty is based,[3] involved a small religious group. Sabbatarians protected in *Sherbert* are likewise comparatively few in number. It is unlikely that more than a handful of Americans share the religious convictions of the woman whose refusal to serve on a jury was vindicated in *Jenison.* The religious convictions of the young men in the conscientious objector cases (*United States* v. *Seeger,* 380 U.S. 163 (1965), *Welsh* v. *United States,* 398 U.S. 333 (1970)) were all individualistic.

The applicable principle in resolving the clash of competing interests in these cases is based upon a recognition that the freedoms secured by the First Amendment are our most precious heritage as a nation. It is because of this recognition that, when our courts consider the validity of legislation regulating rights secured by the Amendment, they do not apply the usual strong presumption of constitutionality applicable to other types of legislation. They give effect rather to "the preferred place given in our

3. See, Waite, *The Debt of Constitutional Law to Jehovah's Witnesses,* 28 Minnesota Law Review 213 (1944).

scheme to the great, the indispensable democratic freedoms secured by the First Amendment." *Thomas* v. *Collins,* 323 U.S. 516, 530 (1945); *Marsh* v. *Alabama,* 326 U.S. 501, 509 (1946); *Prince* v. *Massachusetts,* 321 U.S. 158, 164 (1944). As the Court said in *Barnette* (319 U.S. at 639):

> The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a "rational basis" for adopting. But freedoms of speech and press, of assembly and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect.

This principle was reaffirmed in *Sherbert,* where the Court said (374 U.S. at 406):

> We must * * * consider whether some compelling state interest enforced in the eligibility provisions of the South Carolina statute justifies the substantial infringement of appellant's First Amendment right. It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area "[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation," Thomas v. Collins, 323 U.S. 516, 530. * * *

This Court has been diligent in protecting the religious liberty secured by the First Amendment. Interests which the state would seem to have a clear right to protect have been held subordinate. Government power to prevent fraud,[4] preserve the cleanliness of streets,[5] regulate high-

4. *United States* v. *Ballard,* 322 U.S. 78 (1944); *Cantwell* v. *Connecticut,* 310 U.S. 296 (1940).

5. *Schneider* v. *New Jersey,* 308 U.S. 147 (1939); *Martin* v. *Struthers,* 319 U.S. 141 (1943).

way traffic,[6] raise revenue,[7] require overt manifestation of loyalty,[8] maintain a system of unemployment compensation,[9] and provide for juries in courts,[10] are all subject to restriction when their exercise interferes with religious liberty. Even the rights of an owner to determine who shall enter upon his property may be subordinate to the free exercise of religion.[11]

What interests of the state are so compelling as to justify infringement of the respondents' First Amendment rights? Presumably, they are the integrity of the state's public educational system at the secondary level to insure an educated citizenry and its obligation as *parens patriae* to protect what it deems the welfare of persons who are legally minors.

We submit that nothing in the record establishes a danger to either of these interests of such gravity and immediacy as justifies the substantial infringement of freedom of religion which enforcement of the statute against the respondents entails.

In respect to the integrity of the state's secondary school system we can see no danger to it more serious than that to the integrity of South Carolina's unemployment

6. *Cantwell* v. *Connecticut, supra; Kunz* v. *New York,* 340 U.S. 290 (1951).

7. *Murdock* v. *Pennsylvania,* 319 U.S. 105 (1943); *Follett* v. *McCormick,* 321 U.S. 573 (1944).

8. *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624, 643 (concurring opinion of Mr. Justice Black).

9. *Sherbert* v. *Verner, supra.*

10. *In re Jenison, supra.*

11. *Marsh* v. *Alabama,* 326 U.S. 501 (1946).

compensation system in *Sherbert* or Minnesota's judicial system in *Jenison*. In the *Gobitis* case, the Court upheld the enforcement of the flag salute regulation against a claim of right to exemption under the Free Exercise Clause. In *Barnette*, it stated that the issue was not one of the right to religious exemption but rather the power of the state under the Freedom of Speech guaranty to compel anyone, irrespective of religious beliefs, to salute the flag, and ruled that the state had no such power.

No similar claim is made in the present case. The power of the state to require attendance at secondary school generally is not challenged. All that is asserted is that those whose religious convictions do not permit attendance beyond the elementary school level or attainment of the age of fourteen may not be compelled to violate their conscience by attending. The number of these is so small as to be of insignificant effect: a few Old Order Amish, a few Hassidic Jews (who like the Amish, maintain a strong commitment to traditional customs and practices),[12] perhaps a few others. All in all they cannot amount to more than a fraction of one percent of the population, certainly far less than the number of Jews, Seventh Day Adventists and other Sabbatarians whose right to exemption from the requirement of accepting work was upheld in *Sherbert*.

In assessing the gravity and immediacy of the danger to the state's interest in the present cases as compared to that in *Sherbert*, it is important to note that there was a real factor of possible fraudulency in that case which is

12. See *People* v. *Donner*, 199 Misc. (N. Y.) 643, affirmed 278 App. Div. 705, affirmed 302 N. Y. 857, appeal dismissed 341 U.S. 884 (1951).

not present here. It was not unreasonable for the State of South Carolina to fear that substantial numbers of claimants might misrepresent their religious beliefs in order to qualify for benefits without accepting employment. Public secondary education, however, is a highly valued privilege that is free and the state's child labor laws operate as an effective deterrent to parents who might be tempted falsely to claim religious exemption in order that they may send their children to work in factories. There is, therefore, little motivation for fraud and no reason to believe that the state cannot effectively deal with the rare case of fraud that might arise.

It is also significant that although the motivation for misrepresenting religious beliefs to avoid military service is obviously a strong one, far stronger than motivation to evade secondary education, Congress has not found the task of preventing fraud unmanageable; nor has it found it necessary to abolish or even limit the exemption, even though the interest of national defense is one of great importance.

Finally, we note in respect to the state's interest in an educated citizenry, that in enacting the Civil Rights Act of 1964 Congress decreed that completion of six years of education shall be deemed sufficient to satisfy literacy requirements for voting, and that in the Voting Rights Act of 1970 (42 U.S.C. §1973a(b)) it abolished all literacy requirements. This indicates that at least in the area of voting for those who are to govern our nation, Congress has determined that a formal education is not indispensable. Certainly, an education which includes eight years of schooling is adequate to assure the informed citizenry upon which a democracy depends.

Nor is the state's interest as *parens patriae* any more compelling in the present cases. We are aware, of course, that where the welfare of children is concerned the Court has followed a policy of allowing the legislative branch of government wide discretion even where First Amendment rights are asserted. *Prince* v. *Massachusetts, supra; People* v. *Donner, supra; People ex rel. Wallace* v. *Labrenz,* 411 Ill. 618, certiorari denied 344 U.S. 824 (1952). But the power of the state is not unlimited; it does not include the right to compel parent and child to elect in all cases the temporal to the exclusion of the eternal.

In *Meyer* v. *Nebraska, supra,* the Court rejected a claim that the welfare of children justified a statute forbidding the teaching of a foreign language to children who had not completed eight years of elementary schooling. In *Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925), the Court invalidated a statute whose purpose and effect was to outlaw parochial schools. Even if education obtained by children at a state conducted school were superior, measured by mundane standards, to the education obtained at many parochial schools, would a legislative finding to that effect have resulted in a contrary decision? A Jehovah's Witnesses child who alone in a school refuses to salute the flag undoubtedly suffers emotionally. Would a legislative finding to that effect have resulted in a contrary decision in *Barnette*? If a legislature were to find that some religious teaching has a damaging effect upon the emotional and intellectual development of children, would that fact justify censorship of religious teaching? Christian Scientists and members of other denominations believe that the proper remedy for illness is not medicine but faith and prayer.

Most Americans disagree; but does that fact empower a legislature to forbid parents to teach their children the efficacy of prayer?

The answer to these questions is undoubtedly no, and the reason is that a legislature's power to promote what it deems to be the welfare of children is not beyond judicial scrutiny nor outside the boundaries of the First Amendment. The exercise of religion necessarily entails certain risks to material interests, even those of children. The First Amendment, however, mandates that parents may take these risks so long as it is not established by clear and convincing proof that the risk is grave and the danger immediate. The Wisconsin Supreme Court found that no such proof had been presented, and nothing in the record or in other sources of information which the Court may judicially note impairs the validity of the Wisconsin Court's finding.

II

Other interests entitled to constitutional protection support the decision appealed from.

A. Pluralism in a Democratic Society

Concededly the beliefs of the Old Order Amish are unconventional and their practices do not conform to generally accepted standards. Their clothes, like those of some Hassidic Jews, may seem strange to most Americans. Their simple, agricultural life in a highly industrialized nation and era, may seem even stranger. But the First Amendment ban on laws respecting an establishment of religion or prohibiting its free exercise manifested an in-

tention to accord constitutional protection to the nonconforming and unconventional religions, those which are not part of the general establishment. Indeed, the philosophy underlying the First Amendment was that religious diversity was not something to be merely suffered but to be welcomed. "We wanted a land," in the words of Mr. Justice Douglas, "where our people can be exposed to all the diverse creeds and culture of the world."[13] Uniformity of religious opinion, said Jefferson, was no more desirable than uniformity of face or stature.[14]

Religious pluralism insures domestic tranquility. "In a free government," said the author of the First Amendment, "security for civil rights must be the same as that for religious rights; it consists in the one case in a multiplicity of interests and in the other in a multiplicity of sects."[15]

There was a time, particularly after World War I, when nationalism was at its height and uniformity, political, religious and cultural, was deemed a greatly desired end. It was the era that was committed to the melting-pot theory whereby persons of different nationalities and cultures were transformed into the "American type." It was in this period that Congress enacted an immigration law containing a national origins quota system whose purpose

13. *Dennis* v. *United States,* 341 U.S. 494, 585 (1951) *dissent.*

14. In Notes on Virginia, Blau, *Cornerstones of Religious Freedom in America,* Revised edition, p. 82.

15. Quoted in 1 Stokes, *Church and State in the United States,* p. 348. Voltaire had written: "If there were one religion in England, its despotism would be terrible; if there were only two, they would destroy each other; but there are thirty, and therefore they live in peace and happiness." Quoted *ibid.*

it was to exclude persons from eastern and southern Europe, whose ethnic and cultural backgrounds were deemed too radically different from the Anglo-Saxon norm. It was the period in which states enacted statutes seeking to outlaw or make difficult the establishment of private schools or the teaching of foreign languages.

The decisions of this Court recognized then that insofar as American citizens were affected, cultural uniformity could not constitutionally be imposed coercively.[16] But even in the area of immigration, where the plenary powers of Congress are subject to little if any judicial restraints,[17] the elimination of the national origins quota system[18] testifies to a radical change in national policy. We now recognize that unity and uniformity are not synonymous; that

16. *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925); *Meyer* v. *Nebraska*, 262 U.S. 390 (1925); *Farrington* v. *Tokushige*, 273 U.S. 284 (1927). *Cf. Stainback* v. *Po*, 336 U.S. 368 (1949). In the *Pierce* case, the Court found itself unimpressed by the following argument made by the attorney general of Oregon:

> The subject of immigration is one which is exclusively under the control of the Central Government. The States have nothing to say as to the number or class of the immigrants who may be permitted to settle within their limits. It would therefore appear to be both unjust and unreasonable to prevent them from taking the steps which each may deem necessary and proper for Americanizing its new immigrants and developing them into patriotic and law-abiding citizens. At present, the vast majority of the private schools in the country are conducted by members of some particular religious belief. They may be followed, however, by those organized and controlled by believers in certain economic doctrines entirely destructive of the fundamentals of our government. Can it be contended that there is no way in which a State can prevent the entire education of a considerable portion of its future citizens being controlled and conducted by bolshevists, syndicalists and communists?

17. *Knauff* v. *Shaughnessy*, 338 U.S. 537 (1950).

18. Immigration Act of 1965.

unity may lie in diversity; that we are a nation not only of people but of peoples; that American culture is a plurality of cultures.

Implicit in this controversy between the Old Order Amish and the State of Wisconsin is the extent to which the Constitution protects cultural pluralism. Economic, religious and other considerations make it impracticable for the Old Order Amish to establish a conventional parochial school system on the secondary level, leaving them with no alternative, should this Court reverse the Wisconsin court's decision, but to send their children into the public high schools as they now attend public elementary schools. Many Amish parents feel that in the view of their Church excessive contact with modern education would divert their children from Amish religious and farm life.[19] It is quite possible that if all Amish children were compelled to attend public school until the age of sixteen, on the threshold of both marital and college life, the result would be the assimilation of the Amish youth and the consequent disappearance of the Amish community culture.[20]

As we have noted, immigration laws, anti-private school laws and anti-foreign language laws have been used in efforts to achieve cultural uniformity. Even zoning laws have been used for that purpose. Thus, in 1948, at Mt. Kisco, N. Y., the application of a former European Talmudic college for a zoning permit to conduct a vocational training school in connection with its seminary was opposed

19. See Record, p. 12, in *Garber* v. *Kansas*, 389 U.S. 51 (1966).

20. The fear of assimilation was a major factor in the establishment of the Catholic parochial school system and remains today one of the frequently asserted reasons for the maintenance of the Jewish day school system.

because of the students' and teachers' strange (Hassidic) clothes and hair style and because the instruction was given in the Yiddish language. *N. Y. Times,* November 27, 1948 (editorial page). In the present case, a compulsory school attendance law, even if not so intended, may well have the same effect should this Court allow it to be used against the Old Order Amish. Even if cultural uniformity within the United States were a desirable goal, the Constitution, we submit, does not permit it to be achieved by coercion.

B. Parental Rights and Family Privacy

Little need be said respecting the high estate held by parental rights in our hierarchy of values. In *Prince* v. *Massachusetts,* the Court, citing *Pierce,* recognized that "the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations which the state can neither supply nor hinder." 321 U.S. at 166.

It is hardly disputable that standards of public interest and public welfare have been advancing and continue to advance. We are living in what may be in part a welfare state. Compulsory school attendance originally envisioned only sufficient schooling to prepare children to be able to earn a livelihood. Later it was extended to encompass a full elementary school career and today reaches completion of secondary school or attainment of the age of sixteen. It is by no means impossible that within the next decade or two it may extend through college or at least junior or community college. It is, however, one thing to make higher education freely available to all who wish and can take

advantage of it; it is something entirely different to compel them to do so.

The Court has understandably manifested in recent years great reluctance to interfere with legislative discretion in the arena of social welfare. Yet such discretion may not be constitutionally unlimited, at least where it collides with familial privacy. See *Griswold* v. *Connecticut*, 381 U.S. 479 (1965). The Court is not here faced with a case where parental sovereignty directly and immediately threatens the health, security or welfare of a child as where the parents allow it to engage in adult labor or deprive it of needed medical attention (*Prince* v. *Massachusetts, supra; People ex rel. Wallace* v. *Labrenz, supra*). There is nothing in the record in these cases to support an inference that Amish children are less happy or secure than those raised in conventional religions. We do not therefore have here a situation where the circumstances clearly call for state intrusion into the privacy of the family as the only means of preventing grave injury to children.

The right of privacy, the right to be let alone, is precious in a democratic society. The Constitution protects freedom of association (*National Association for the Advancement of Colored People* v. *Alabama*, 357 U.S. 449 (1958); can it be said that it does not protect equally the freedom of non-association? The effect of the statute as applied in these cases is to compel Amish children to associate with non-Amish during their school years up to the age of sixteen. The rationale of *Pierce* is that such compulsory association is constitutionally impermissible. If the State of Wisconsin may compel Amish of the ages of

fourteen and fifteen to associate with other children within the four walls of a school building six hours a day and five days a week, why may the State of Oregon not compel Catholic children to associate with non-Catholics within the four walls of a public school building during the same period of time?

In the Amish community the family is a closely knit, cohesive unit. It impinges on the right of no other individual or group. It asks only to be let alone. No doubt many Americans consider it an anachronistic vestige of a primitive simple society (as other Americans no doubt consider Hassidic Jews to be). Yet, can it be held that its right to be let alone is entitled to no constitutional protection? Can it be held that the state may intrude upon the privacy of the family in the absence of clear proof of compelling necessity?

In *People ex rel. Sisson* v. *Sisson*, 271 N.Y. 285 (1936), the New York Court of Appeals wisely said:

> * * * The vast majority of matters concerning the upbringing of children must be left to the conscience, patience and self-restraint of father and mother. No end of difficulties would arise should judges try to tell parents how to bring up their children. Only when moral, mental and physical conditions are so bad as seriously to affect the health or moral welfare of children should the courts be called upon to act.

While the Court of Appeals stated this as a guide for the exercise of judicial discretion, we submit it is equally valid as a mandate for legislative restraint in intruding upon the privacy of family life.

C. The Rights of Mature Minors

We are not in these cases faced with the difficult problem arising when there is a division within the family as to the religious upbringing of children.[21] Nor are we faced with the equally difficult problem arising from a division between parents and child. In none of the cases before the Court is it suggested that there is any conflict between the respondents and their children regarding the latters' continuance in school. The controversy before this Court is one between youths of 14 and 15 on the one hand and the State of Wisconsin on the other as to their right to participate (with their parents) in the making of a decision which the State concedes they may make a year or two later.

In the Jewish tradition, the age of maturity for decision making in matters of faith is thirteen. From that time on one is deemed the equal of all adults in membership in the Congregation of Israel and is equally responsible for his decisions as a member of that Congregation.

The common law designated the age of twenty-one as the termination of legal infancy, but that was simply the adoption of the age of eligibility to knighthood in the feudal system,[22] and even at common law a youth of 14 could legally indenture himself as a servant.[23]

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21. *Matter of Auster* v. *Weberman,* 198 Misc. (N.Y.) 1055, affirmed 278 App. Div. 656, affirmed 320 N.Y. 855, appeal dismissed 342 U.S. 884 (1951) (parents); *People ex rel. Portnoy* v. *Strasser,* 303 N.Y. 539 (1952) (parent and grandparent).

22. 2 F. Pollock and F. Maitland, *History of English Law* 438 (1968).

23. *Ibid.* 436-437.

Today there are few vestiges of common law concepts of infancy. By judicial decisions and by statute persons under the age of 21 are made responsible for many of their decisions and are recognized as entitled to make those decisions. On attaining the age of eighteen a youth must register for military service and by virtue of the Twenty-Sixth Amendment has the right to participate in deciding who shall govern the nation and the states. And, as indicated, even in Wisconsin at the age of sixteen he has the right to terminate his schooling.

We do not contend that a youth of fourteen or fifteen has a constitutional right to make for himself all the decisions he could make if he were twenty-one. We contend only that in the light of contemporary knowledge and standards, he does have a right to participate in deciding the extent of his education, and that this right is within the ambit of the Free Exercise Clause, the Due Process Clause and the Ninth Amendment. We contend further that this right merits substantial consideration in the judicial resolution of the clash of competing interests involved in the present cases. We suggest too that in weighing these interests consideration must be given to the psychological hurt suffered by these youths if they are forced by law to engage in a practice which they believe to be against the will of God and inimical to their own salvation.

In sum, we submit that when the factors of freedom of religion, pluralism, parental rights and family privacy, and the rights of mature minors are at stake, a very strong case must be made to establish a compelling state interest sufficient to outweigh them. We submit further that the State of Wisconsin has failed to make such a case.

Conclusion

For the reasons stated, the judgment of the Supreme Court of Wisconsin should be affirmed.

Respectfully submitted,

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